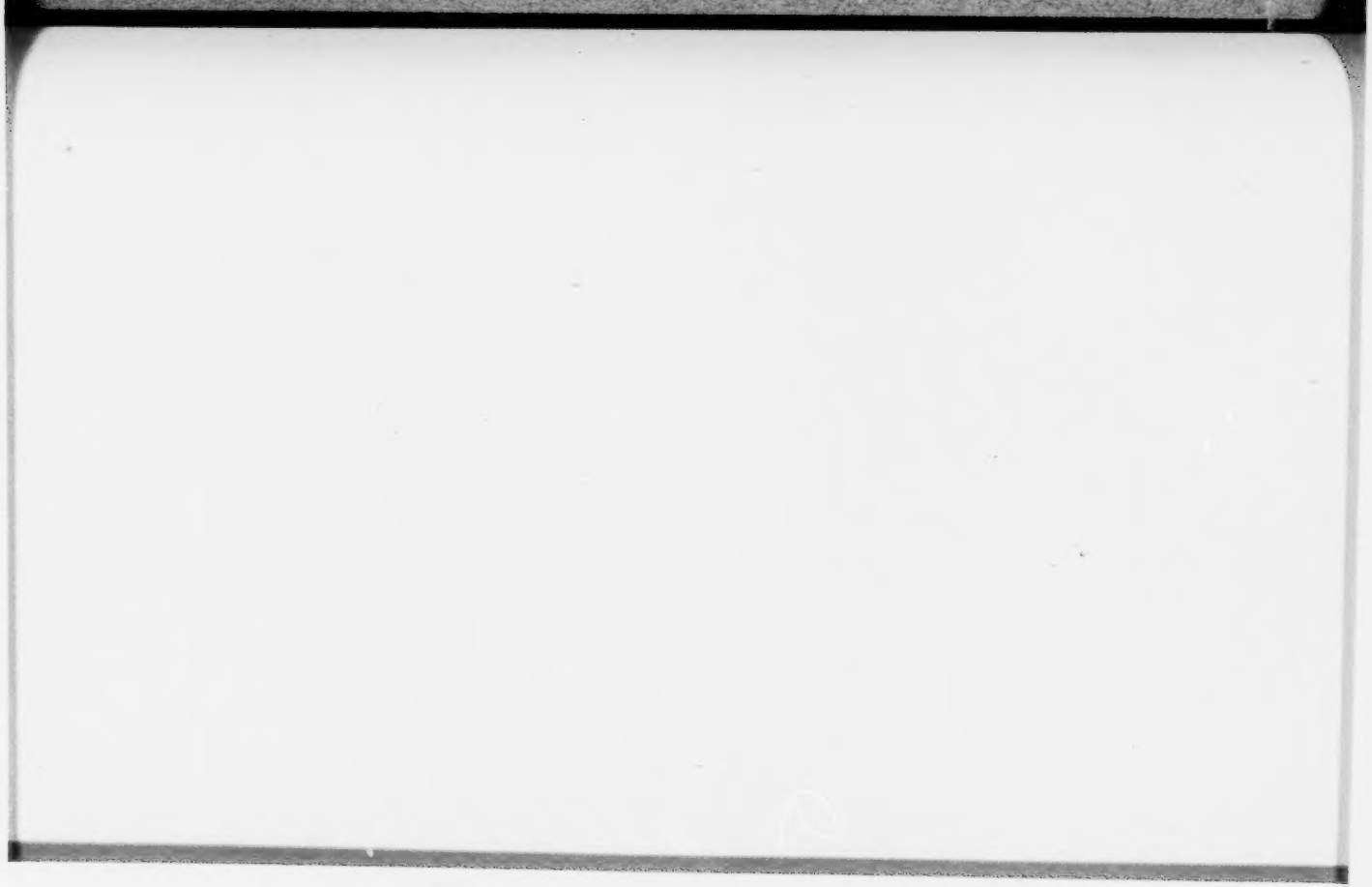

FEB 24 1944
CHARLES ELMORE CROPLEY
CLERK

No. 646

In the Supreme Court of the United States

OCTOBER TERM, 1943

BIRMINGHAM CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States (R. 14–22) are reported in 1 T. C. 808. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 33–37) are reported in 138 F. 2d 455.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 1, 1943. (R. 37.) The petition for a writ of certiorari was filed on January 28, 1944. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is a personal holding company subject to the surtax imposed by Section 351 (a) of the Revenue Act of 1934 for the year 1935, or is it entitled to exemption under Section 351 (d), where one of the stockholders failed to include his pro rata share of the "adjusted net income" of the company in a timely income tax return filed on or before March 15, 1936, but included the amount in a second amended return filed out of time on March 28, 1936?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set out in the Appendix, *infra,* pp. 10–12.

STATEMENT

The facts as found by the Tax Court (R. 16–18) may be summarized as follows:

The taxpayer is a corporation duly organized and existing under the laws of Delaware with an office in the Brown-Marx Building, Birmingham, Alabama. (R. 16.)[1] During the year 1935 the taxpayer was a personal holding company with 80

[1] The name of the taxpayer was changed on July 3, 1940, from Southern Investors Corporation to its present name, Birmingham Corporation. (R. 3, 16.)

shares of class A stock and 720 shares of class B stock owned as follows (R. 16):

	A	B
Otto Marx, Sr	79 9/10	454
Agnes M. Marx	2/10	5
Trust for the benefit of Audrey A. Dietsch		63
Otto Marx, Jr		99
Henry M. Marx		99
Total	80	720

Agnes Mosler Marx was the wife of Otto Marx, Sr., and Audrey A. Dietsch, Henry M. Marx, and Otto Marx, Jr., were their children. (R. 16.)

Otto Marx, Sr., dominated the corporation. During 1935 the only formal directors' and stockholders' meetings held occurred on January 8. Otherwise the affairs of the corporation were conducted in an informal manner. (R. 16.)

In December, 1935, Otto Marx, Sr., determined it would be to the company's advantage not to distribute its earnings for 1935, and in oral conversations he proposed to the other stockholders that such a course be followed and that each stockholder in his individual income tax return for 1935 include his pro rata share of the company's adjusted net income. All the stockholders agreed. (R. 17.)

The company on March 16, 1936, filed a personal holding company tax return on Form 1120 H and reported adjusted net income of $43,997.35 stating that it would avail itself of Section 351 (d) of the Revenue Act of 1934 (Appendix,

infra). In schedule D of the return the following amounts were reported to be included in the individual tax returns (R. 17):

Otto Marx, Sr	$29,357.24
Agnes M. Marx	285.98
Trustees for Audrey A. Dietsch	3,464.80
Otto Marx, Jr	5,444.67
Henry M. Marx	5,444.67
Total	$43,997.36

All of the stockholders, except Henry M. Marx, included the above amounts in their individual income tax returns for the year 1935. (R. 17–18.)

Henry M. Marx filed a return on or about February 20, 1936, which did not include his pro rata share of the company's adjusted net income for the calendar year 1935. On March 7, 1936, he filed an amended return and did not include therein his pro rata share of the adjusted net income of the taxpayer for the year 1935. (R. 18.)

On or about March 8 or 9, 1936, the company's secretary, Wilkens, informed Henry M. Marx of his pro rata share. At this time he was busy in professional work as a lawyer and neglected to take immediate steps to correct his mistake of failing to include in his first return filed February 20, 1936, and his amended return filed March 7, 1936, his share of the adjusted net income of the company. On March 28, 1936, he filed an amended return including his pro rata share. (R. 18.)

The Tax Court held that the second amended return of Henry M. Marx, filed March 28, 1936, was too late and did not comply with the require-

ments of Section 351 (d) of the Revenue Act of 1934. It sustained the imposition of the personal holding company surtax. (R. 15, 23.)

The Circuit Court of Appeals, one judge dissenting, affirmed the decision of the Tax Court. (R. 33–37.)

ARGUMENT

The taxpayer, admittedly a personal holding company, is subject to the surtax imposed by Section 351 (a) of the Revenue Act of 1934 (Appendix, *infra*) unless the requirements of Section 351 (d) of that Act (Appendix, *infra*) have been complied with.

Section 351 (d) provides that the surtax shall not apply "if *all* the shareholders of the corporation include (*at the time of filing their returns*) in their gross income their *entire* pro rata shares, whether distributed or not, of the 'adjusted net income' of the corporation for such year." (Italics supplied.)

Thus to avoid the surtax, the statute requires that "all" of the shareholders, not some, must include their pro rata share of the net income of the company "at the time of filing their returns." Admittedly neither of those requirements was complied with in the instant case. One of the stockholders, Henry Marx, filed his individual tax return for the year 1935 on February 20, 1936, and an amended return on March 7, 1936. Neither of those returns included his pro rata share of the company's net income. In the ab-

sence of securing an extension of time to file, March 15, 1936, is the last day fixed by law for filing a timely return. He secured no extension but on March 28, 1936, he filed a delinquent amended return in which his pro rata share was included. An extension of time for filing returns is not a matter of right but is granted only in cases where good cause is shown. Furthermore, the taxpayer had filed an original and an amended return so that no extension to file was in order. Nor was an extension requested or granted.

The language of the statute is clear and free from ambiguity. It prescribes the condition precedent for escaping the surtax that the stockholders include their share of the net income of the company at the time of filing their individual returns, on or before March 15. That condition was not complied with and the surtax was therefore properly imposed.

The decision below is in accord with principles established by this court in *Riley Co.* v. *Commissioner,* 311 U. S. 55; *Scaife Co.* v. *Commissioner,* 314 U. S. 459; and *Helvering* v. *Lerner Stores Co.,* 314 U. S. 463. Cf. *Mother Lode Co.* v. *Commissioner,* 317 U. S. 222. Nor do the decisions in the lower courts promote "confusion and conflict" as suggested by the taxpayer (Pet. p. 5).[2] Section

[2] Of the two cases cited by petitioner in support of this statement, *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. (2d) 388 (C. C. A. 4), is definitely inconsistent with *Riley Co.* v. *Commissioner,* 311 U. S. 55; indeed this Court expressly noted that its grant of certiorari in the *Riley* case was predicated

351 gives a personal holding company and its stockholders an election as to whether the corporation should pay the surtax or the shareholders pay individual income taxes on the undistributed corporate net income. The decision below is in accord with many cases holding that a statutory choice under the revenue acts cannot be changed after the date for the timely filing of returns has passed.[3] Indeed in *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194, a case involving an election between two methods of reporting gain or loss on installment sales, the Court said (pp. 194–195):

> There is nothing to suggest that Congress intended to permit a taxpayer, after expi-

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on the conflict between the decision below in that case (which was affirmed) and the *Mead* case. *Morrow, Becker & Ewing* v. *Commissioner*, 57 F. (2d) 1 (C. C. A. 5), permitted the taxpayer to amend out of time because the original return was filed before the adoption of regulations under a new law which made radical changes in the existing law. No such circumstance occurs here.

[3] Election of husband and wife to file joint or separate returns: *Rose* v. *Grant*, 39 F. (2d) 340 (C. C. A. 5); *Buttolph* v. *Commissioner*, 29 F. (2d) 695, 696 (C. C. A. 7); *United States* v. *Pettigrew*, 81 F. (2d) 666 (C. C. A. 9th); and *Champlin* v. *Commissioner*, 78 F. (2d) 905 (C. C. A. 10th). Election of affiliated corporations to file consolidated or separate returns: *Dr. Pepper Bottling Co.* v. *Commissioner*, 69 F. (2d) 768 (C. C. A. 5); *Radiant Glass Co.* v. *Burnet*, 54 F. (2d) 718 (App. D. C.); *Alameda Inv. Co.* v. *McLaughlin*, 33 F. (2d) 120 (C. C. A. 9th). Election as to method of returning profits on installment sales: *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194; *Commissioner* v. *Moore*, 48 F. (2d) 526 (C. C. A. 10th), certiorari denied, 284 U. S. 620.

ration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in question according to the deferred payment method, petitioner made an election that is binding upon it and the commissioner.

The Board of Tax Appeals, now the Tax Court, has consistently held that the statutory requirements of Section 351 (d) must be strictly followed in returns filed by the stockholders on or before March 15, the due date prescribed by law for filing returns. *Automobile Loans, Inc.* v. *Commissioner,* 36 B. T. A. 809; *Collateral Mortgage & Investment Co.* v. *Commissioner,* 37 B. T. A. 630. Cf. *Howe* v. *Commissioner,* 44 B. T. A. 894.[4]

The dissenting opinion below is based on hardship, lack of fraud or intent to evade taxes, and the acceptance of the amended return by the Collector. But the plain and obvious requirements of the statute cannot be sacrificed even for the

[4] The taxpayer relies (Pet. 6) upon the cases of *Clay* v. *Commissioner,* 40 B. T. A. 562, and *Bleser* v. *Commissioner,* 41 B. T. A. 643. Neither of those cases is in point or applicable to the facts of the instant case. In the *Clay* case the Board held that a "slight discrepancy" between the income reported by the sole stockholder of a company and its true adjusted net income was immaterial. But there a timely return had been filed which was believed to show the correct amount of the company's net income. In the *Bleser* case the Board held that the executors were taxable on decedent's entire distributive share of the corporation's net income even though considerably in excess of the amount reported by the decedent.

exigency of a hard case. *Riley Co.* v. *Commissioner, supra,* pp. 58–59; *Scaife Co.* v. *Commissioner, supra,* p. 463; *Deputy* v. *du Pont,* 308 U. S. 488, 498. In the *Riley* case the equities of the taxpayer were far stronger than in the case at bar. There the taxpayer's remoteness and lack of adequate mail service were responsible for his failure to know of a change in the statute. Here the stockholder, a lawyer who was fully aware of the statutory requirements, was merely too busy to file the proper return on time.

CONCLUSION

The decision below is correct, there is no conflict, and the petition should be denied.

Respectfully submitted.

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FEBRUARY 1944.